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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1256

JESSE PUGH,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to the revised rules of this Court, Rule 24, the Respondent submits this brief in opposition to the captioned petition for certiorari.

Question Presented

The following question is presented by this appeal:

1. Was an Indictment which charged the crime of feloniously operating a policy business (in violation of § 974-a of the former Penal Law of the State of New York) and maintaining a place for playing the game of policy (in violation of § 975 of the former Penal Law of the State of New York) phrased substantially in the words of the statute sufficient to protect petitioner's rights under the Fifth and Sixth Amendment to the United States Con-

stitution and Article I § 6 of the Constitution of the State of New York?

Facts

The petitioner Jesse Pugh was charged by an Indictment filed March 10, 1967, in the Westchester County Court with four violations of the former Penal Law of the State of New York (then in force). The defendant was found not guilty of counts three and four, after a non-jury trial.

Counts One and Two charged the defendant as follows: "THE GRAND JURY OF THE COUNTY OF WESTCHESTER, by this Indictment, accuses the defendant of the crime of OPERATING A POLICY BUSINESS IN VIOLATION OF § 974-a OF THE PENAL LAW, committed as follows:

The defendant, in the City of Yonkers, County of Westchester, State of New York, on or about February 14, 1967, did willfully, knowingly, wrongfully and feloniously receive written records of more than one hundred plays, bets and wagers, said plays, bets and wagers being writings, papers and documents used in what is commonly called policy and the numbers game.

Second Count:

AND THE GRAND JURY AFORESAID, by this Indictment, further accuse the defendant of the crime of FELONIOUSLY MAINTAINING A PLACE FOR PLAYING THE GAME OF POLICY, committed as follows:

The said defendant, in the City of Yonkers, County of Westchester, State of New York, on or about February 14, 1967, did knowingly keep, occupy or use certain premises for the purpose of receiving written records of more than 100 plays used in playing what is commonly called policy and the numbers game.

A motion was made to dismiss the indictment on the grounds that it was defective in that it repeated the statu-

tory language constituting the respective crimes was denied by the trial judge. The defendant was found guilty as charged under the two counts set forth above.

The Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department affirmed at 36 App. Div. 2d 845, 321 N.Y.S. 2d 845, and the Court of Appeals of the State of New York affirmed the conviction without opinion at 29 N.Y. 2d 909, 325 N.Y.S. 2d 860.

Reasons for Denying the Writ

The question of whether an indictment that recites the words of a statute is sufficient is by no means novel. The tests by which the indictment are measured is twofold: that it informs him of the nature of the charges against him and that it protects him from being subject to trial for the same offense at a later date; *U.S.* v. *Carll*, 105 U.S. 611, 26 L. Ed. 1135; *U.S.* v. *Neura*, 60 U.S. 19 (How.) 92, 15 L. Ed. 531.

However, proceeding upon what appears to be a case to case basis, this court has often held that framing the indictment in the statutory language meets the requirements of the United States Constitution,

U.S. v. *Gooding*, 25 U.S. (12 Wheat.) 460 at 473, 6 L. Ed. 693;
U.S. v. *Simmons*, 96 U.S. 360, 24 L. Ed. 819;
U.S. v. *Britton*, 107 U.S. 655, 2 S. Ct. 512, 27 L. Ed. 520.

In citing the latter authorities, the court in *Pounds* v. *US*, 171 U.S. 35, 18 S. Ct. 729, 43 L. Ed. 62 remarked "in such a case (that is, a statutory crime) it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter."

This is in accord with the court's holding in *Potter* v. *US*, 155 U.S. 438, 15 S. Ct. 144 where the court acknowl-

edged that some statutory offenses require more than the statutory language "yet if such language is according to the natural import of the words, fully descriptive of the offense, then ordinarily it is sufficient," at 444.

Moreover, the cases in which the indictments were held insufficient have been those in which an essential element of the crime was omitted such as *Russell* v. *US*, 369 US 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240. There, the failure to allege that the question of the congressional committee that the defendant did not answer was relevant to the committee's inquiry was fatal. Because the indictment did not specify the exact questions upon which the charges were based, double jeopardy was a possibility:

The fact that the exact manner in which the crime was committed is not set forth, however, does not render the indictment invalid. In *Wong Tai* v. *US*, 273 US 77, 47 S. Ct. 300, 71 L. Ed. 545, the indictment charged the defendant with conspiracy with a named person to receive, conceal, buy, sell, and facilitate the transportation and concealment after importation, of opium, knowing it to have been imported contrary to law, and the language was held to be sufficient. A demurrer on Sixth Amendment grounds was denied. After conviction the court looked at the record to see if the defendant appeared to be surprised or his rights prejudiced by the failure to provide more definite information. In *Evans* v. *US*, 153 US 584 at 612 the court stated it was "for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense." While Jesse Pugh has complained about the use of statutory language it is nowhere alleged that he was surprised by the People's proof.

A case in which the crime charged in the indictment was similar to the instant case is *Ledbetter* v. *US*, 170 US 606, 18 S. Ct. 774, 42 L. Ed. 1162. In *Ledbetter* the defendant was charged in the words of the statute with carrying on

the business of a retail liquor dealer without payment of a special tax. It is respectfully submitted that such an averment is at least as broad as the one which charged Jesse Pugh. It is open to even broader attack than in the Pugh case on the grounds that it does not sufficiently inform the defendant of the charges against him or protect him from double jeopardy. This was particularly true in *Ledbetter* because the indictment specified only a month of commission, and not a certain date.

In approving of the indictment the *Ledbetter* court said:

> "The cases wherein it is held that an indictment in the exact language of the statute is not sufficient are those wherein the statute does not contain all the elements of the offense, as in U.S. v. Carll, 105 U. S. 611, where a statute against passing counterfeit money failed to aver the scienter; but, where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient, though that offense be more fully defined in some other section. U. S. v. Goodin, 12 Wheat. 460, 473; U. S. v. Wilson, Baldwin, 78, 119, Fed. Cas. No. 16,730; Hess v. State, 5 Ohio St. 5; Harrington v. State, 54 Misc. 494.
>
> Notwithstanding the cases above cited from our Reports, the general rule still holds good that upon an indictment for a stautory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense. Where the statute completely covers the offense, the indictment need not be made more complete by specifying particulars elsewhere obtained. Whiting v. State, 14 Conn. 487; Simmons v. State, 12 Mo. 268; State v. Smart, 4 Rich. (S. C.) 356; Perkins v. State, 14 Md. 184." at 611-2.

While discussing the issue of possible surprise, it is relevant to note that Jesse Pugh made no attempt to exercise

his privilege to move for a bill of particulars. If he can claim surprise at all (which he has not done) his claim should be evaluated in the light of his failure to exercise his privilege to request a bill of particulars.

State Grounds

The petitioner also raises as error the possibility that the instant indictment violates the New York State Constitution, Art. I § 6. His argument was raised both in his brief in the Court of Appeals of the State of New York (Point VIII of the defendant-appellant's brief) and in oral argument before that bench. The highest court of the state has thus rendered a decision on this state law question. It has always been held that a state court is the ultimate arbiter of its own constitution, *Walker* v. *Sauvinet*, 92 US 90, 23 L. Ed. 678. The instant case offers no reason to deviate from that well-established principle.

However, should this court endeavor to determine the merits of the state law question, it will find that the indictment was sufficient to conform to the dictates of New York State Constitution Article I, Sec. 6.

In briefing his argument on this point the petitioner has relied to a great extent on *People* v. *Corbalis*, 178 NY 516, 71 N.E. 106. It is respectfully submitted to this court that in the *Corbalis* case the indictment failed to allege an element of the crime. In *People* v. *Weiss*, 158 App. Div. 235, 142 N.Y. Supp. 1092, aff'd. 210 NY 546, 104 N.E. 1136 *Corbalis* was distinguished:

> "'It is the rule that, in addition to charging the crime, the indictment must contain a plain and concise statement of the act constituting the crime. The rule is salutary because, in the first place, the defendant is enabled to prepare his defense, and, second, because a second indictment for the same offense may be avoided. People v. Corbalis, 178 N. Y. 516 [71 N. E.

106]. The demurrer was sustained in the Corbalis Case, supra, because it did not allege any act constituting the crime, and it cannot be regarded, therefore, an authority which would justify the decision'—citing *People* v. *Trainor*, 57 App. Div. 422, 68 N. Y. Supp. 263, and *People* v. *Cavanagh*, 157 App. Div. 224, 141 N. Y. Supp. 812."

The holding in the *Corbalis* case was further distinguished in *People* v. *Hoyt*, 145 App. Div. 695, 130 NY Supp. 505, affirmed 205 NY 533, 98 NE 1110:

"It is conceded that the indictment is in proper form if the rule laid down in People v. Alderdice, 120 App. Div. 368 [105 N. Y. Supp. 395], is the correct one, but it is contended that such rule is not in accord with later decisions in the Court of Appeals, and especially with that of People v. Corbalis, 178 N. Y. 516 [71 N. E. 106]. The indictment under consideration in that case was for pool selling, and it was held bad because it did not state in what manner it was claimed the defendant had committed any of the several acts constituting the crime of selling, or aiding and abetting the selling of pools. No new rule with respect to the form of indictments was enunciated by that decision. * * * All that was decided in the Corbalis Case, and all that was attempted to be decided, was that under the peculiar reading of the statute against pool selling it was necessary to set forth in the indictment what act the defendant did that brought him within the inhibition of the statute."

In *People* v. *Abelson*, 162 App. Div. 674; 148 NYS 30 the defendant was indicted for keeping a room to be used for the purpose of gambling, a charge at least as broad as in the instant case. The court held that the use of the statutory language was not only an acceptable pleading but a model one (citing *People* v. *Trainor*, 57 App. Div. 422; 68 NY Supp. 263):

"The form of the information at bar is that which has been used for many years in the first count of the gambling indictment, containing various counts, in use in the District Attorney's office in this county. Of that count Mr. Justice Hatch, writing for a unanimous court in *People* v. *Trainor*, 57 App. Div. 422, 68 N. Y. Supp. 263, said:

> 'The first count of the indictment charged the appellant and one Langfried with the offense of keeping a room to be used for the purpose of gambling. * * * The judgment is asked to be set aside: * * * First, that the first count of the indictment is insufficient as failing to specify any crime. * * * The offense in the first count is substantially in the language as such offense is defined in the statute. The offense therein defined consists in keeping a room or other place specified therein, or any part thereof, to be used for gambling. The averment is that the defendant did unlawfully keep a certain room in a certain building to be used for gambling. This was not only the statement of a fact, but it was a concise statement of the offense as defined in the statute. It was therefore, not only a good pleading, but a model pleading, and in all respects sufficient to support the verdict rendered thereunder.' "

The rationale for such a rule is evident. Certain crimes which can be pleaded in the words of the statute will advise the defendant of the allegations against him. To require more information to be set forth would necessitate a recitation of evidence as distinguished from accusations. In restating the rule discussed in the previous cases, the New York Court of Appeals remarked:

> "But it is commonly understood that, among the different crimes which exist under our laws, the degree of definiteness appropriate to put the defendant on notice may vary according to the necessities inherent in the particular crime charged. This means that in

certain instances, such as the one now before us, an allegation that closely follows the words of the statute need not, as a matter of law, be deemed insufficient. The statute may itself be enough detailed in describing the crime that more may be either unnecessary or even impossible. Thus, in the instant case, the information charged that this relator did 'aid and abet in the operation' of a *specific* gambling establishment at a *specific* time. Although the exact means of assistance were not set forth in specific detail, in a setting such as this an information that sets forth the ultimate facts to be proven, as opposed to mere conclusions of law, need not also set forth the underlying evidentiary facts."

People ex. rel. Guido v. *Calkins*, 9 NY 2d 77 at 81, 211 NYS 2d 166, 172 N.E. 2d 549.

It is, therefore, respectfully submitted to this court that the indictment in the instant case conforms to the requirements established by Art. I § 6 of the New York State Constitution.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals of the State of New York should be denied.

Dated: April 14, 1972.

Respectfully submitted,

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